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VOL. 30 FEBRUARY, 1955 No. 5

The President's Page

By Harold A. Black

Out-going President, Los Angeles Bar Association

Harold A. Black

Later this month, the newly elected officers and trustees will be installed and the "old guard" will be relieved, an event which I can contemplate with equanimity.

To all the members of the Association go my thanks for the honor and privilege of serving as your president during the past year. I am deeply grateful also for your loyalty to the Association and your universal willingness to act in any capacity whenever I called upon you.

The experience of occupying the office, with the necessary result of becoming personally familiar with the work being carried on, confirms one's belief in the value, indeed the indispensability, of the local bar association. A really impressive volume of useful and beneficial service goes quietly on, unselfishly performed by hundreds of our members without much public recognition, all tending to promote the welfare, not only of our Association, but of the profession as a whole and the public.

I should not let my term expire without paying special tribute to the devoted co-operation given me by our officers and trustees and by Lou Elkins and his staff. Whatever progress has been made in the affairs of the Association (and I believe we can say that we are in a healthy condition) is very largely due to their loyalty and industry. They are a long way from being a group of "yes men," but after policies have been debated, and a program agreed upon, there have been no obstructionists.

The Association can look forward to a most successful year under the able and efficient leadership of Ken Chantry. If he gets the same support that it has been my good fortune to receive, the outlook is bright indeed.

Issue Editor—Harned P. Hoose

What Kind of Independence Do We Ask in the Judiciary?

By LEON R. YANKWICH*

Leon R. Yankwich

The Code of Ethics for lawyers which is embodied in one of California's Codes, —Business and Professions Code, Section 6068,—makes it one of the duties of the attorney

". . . to maintain the respect due to the courts of justice and judicial officers."

In a prior talk to a group of admittees I treated one phase of the question (Los ANGELES BAR BULLETIN, Vol. 28, No. 11, p. 393 et seq.) stressing particularly the delicacy of the relationship between counsel and court, and the necessity,—in the words of Mr. Justice Jackson in a famous case,—not to

"equate contempt with courage or insults with independence."
(Sacher v. United States, 1951, 343 U.S. 1, 14)

Now I speak of the duty of the lawyer to help maintain the independence of the Judiciary by encouraging courageous action by Judges.

I

AN INDEPENDENT JUDICIARY

An independent judiciary is a part of the democratic tradition. It was one of the complaints of the colonists against the English King that he stood in the way of an independent judiciary. In the Declaration of Independence they charged that:

"He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

"He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

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*Chief United States District Judge Southern District of California. This article comprises the address given by Judge Yankwich upon the occasion of the admission of a group of lawyers to the Federal Bar, on January 5, 1955. This address complements the one previously printed in the Los Angeles Bar Bulletin.

And the Constitution sought to assure the independence of the federal judiciary by providing for service "during good behavior" and against diminution of compensation "during their continuance in office," for both constitutional judges and for such judgeships as may be created by the Congress. (Constitution, Art. III, Sec. 1.)

All agree on the need for such independence. Senator Alexander Wiley of Wisconsin, when he was Chairman of the Senate Judiciary Committee, stated the meaning of this independence in this manner:

> "An independent Judiciary is a strong Judiciary, a fearless Judiciary, having respect for its co-equal branches of government, but respecting even more its paramount obligation to the American people in interpreting the supreme law of the land." (Wiley, The Meaning of An Independent Judiciary, 1948, 7 F.R.D. 553, 556)

By contrast, in totalitarian countries such as Soviet Russia, the Judiciary is considered "an organ of state power." (Julian Towster, Political Power in the U.S.S.R., 1917-1947, (1948) p. 304)

The division of powers embodied in the Constitution also expresses the ideal of the independence of the Judiciary without the power of the executive and legislative branches to encroach on its prerogatives. These are truisms which no one disputes. Yet, at times, in the conduct of lawyers towards the Judiciary, the desire to achieve an immediate result becomes more important than the maintenance of respect of courts and of judicial officers, and their courageous independence. More specifically, many lawyers in their zeal to serve their client's cause, do not hesitate to take action which not only reflects on the person of the Judge, but which is not consistent with protests as to a desire to have a fearless, independent judiciary. And often, as I read in the books and see in the press, things said concerning Judges not only by laymen but by lawyers, I ask myself this question: Do we want really independent judges or do we just mean judges who are only independent as the momentary whim of a litigant may command?

II

DISQUALIFICATION OF JUDGES

What gave me the thought of emphasizing this point again was the suggestion of a rather independent young university man, not a lawyer, who had lived in Minnesota and had great admiration for Judge Luther W. Youngdahl, that he should have stepped aside in the Lattimore case when requested to do so by the Government.

The attitude is very common and is one shared by many lawyers who feel that the moment it is indicated that a litigant or his lawyer does not desire a particular judge to try the case, the Judge should take himself out of the case. Speaking as a Judge of over a quarter of century experience, I would say that in ordinary cases, the Judge's attitude should conform to the thought expressed by the Supreme Court of the United States in a famous case:

> "For what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside?" (Berger v. United States, 1921, 255 U.S. 22, 35.)

The answer is that, *ordinarily*, it is of no concern. But a federal judge of great courage who presided at some famous trials in Missouri involving general election frauds, has condemned the attitude that would call for *immediate disqualification* at the request of a litigant in this language:

> ". . . Such things have been said, but not by those who think. The father of such a conception of the duty of the judge is the fundamental error that the judge is but a referee at a game, chosen by the players, subject to removal at the will of either. He is not a referee at a game. He is *not* the representative of the parties. He is the representative of the sovereign and he will abandon the trust reposed in him only at the sovereign's command or when he falls at his post." (United States v. Buck, D.C. Mo., 1937, 18 F. Supp. 827, 828-829.)

In the particular case, the attempt was made to disqualify Judge Merrill E. Otis, who, in ruling on some legal questions relating to the various indictments before the trial, had used rather strong language in characterizing *the acts* with which the defendants were charged. He was not commenting on *their truth*. He was merely commenting on the enormity of the offenses. The Court of Appeals sustained his attitude, saying:

> ". . . His statements were made in the course of judicial proceedings prior to an appeal to this court. The common knowledge of a widespread condition in Kansas City would not necessarily include any particular precinct. As said in Craven v. United States, 1 Cir., 22 F.2d 605, 608, 'The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of bias (or state of mind, (Berger v. United States) 255 U.S. (22) 42, 41 S. Ct. (23) 236, 65 L. Ed. 481) against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him.' An opinion based upon evidence cannot be considered a per-

(Continued on page 147)

Frequently Recurring Title Problems

EDITOR'S NOTE: *This is the second installment of a series in which Mr. Healey has collected the most common problems confronting lawyers in this field. The problems and Mr. Healey's comments are rendered in alphabetical order, for easy reference. The balance of his suggestions will follow in subsequent issues.*

By James F. Healey, Jr.*

DIVORCE

(1) *Award in Interlocutory Decree:* Where real property is awarded by the Court in the Interlocutory Decree of Divorce, such award appears to be "surplusage" and merely a preliminary determination of the manner in which the community real property of the parties shall be assigned at the time of entry of the Final Decree. (*Johnston v. Johnston,* 106 Cal. App. (2) 775.) Where immediate marketability of the property is desired, a deed between spouses appears to be the only solution.

(2) *Lis Pendens:* Where property rights are put in issue by a divorce action, it behooves counsel to consider the advisability of filing a *lis pendens.* To cite the most common case, assume title in husband and wife as joint tenants and wife sues for divorce, alleging that the real property is community and praying that it be awarded to her. Since either spouse may sever the joint tenancy at any time, by conveying to a third party an undivided one-half interest, counsel for the plaintiff wife would be well advised to file a *lis pendens* immediately, in order to serve notice to the world that plaintiff contends that the real property is community (and hence, husband alone may not convey any portion thereof).

(3) *Lien of an alimony judgment:* A judgment wherein the amount is definite or computable becomes a lien upon the timely recordation of an abstract thereof. However, a judgment for an indefinite period or for a period determinable by a contingent event (*e. g.,* a judgment for payment of $100 per month until further order of court) does not become a lien. (*Yager v. Yager,* 7 Cal. (2d) 213; *Bird v. Murphy,* 82 Cal. App. 691.)

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*Associate Counsel, Title Insurance and Trust Co., Los Angeles.

EASEMENTS

Most of the difficulties arising in connection with easements stem from the ambiguous language employed in the document which creates them, or from the failure to adequately set forth the intention of the parties. For example, if it is the intention of the parties to create an appurtenant easement, why not say so in the deed and describe the dominant tenement for the benefit of which the easement is being created, rather than await the possible outcome of future litigation which may arise over a question of "after-acquired title" or a problem resulting from failure to describe the easement in some future conveyance?

Frequently, one encounters a conveyance wherein the granting clause conveys "a strip of land described as follows . . ." and the *habendum* clause recites "to have and to hold for road purposes." Just as frequently, however, one encounters deeds wherein the language of the granting clause reads "a strip of land described as follows . . . , for road purposes." What is the difference? The former has been held to convey the fee title (*Las Posas Water Company v. County of Ventura,* 97 Cal. App. 296) and the latter has been held to convey only an easement. (*Pellissier v. Corker,* 103 Cal. 516.) Where the purpose for which the deed is executed appears in the *habendum* clause, the qualifying language employed therein will not debase the fee conveyed by the granting clause; but where the qualifying words appear in the granting clause, the intention to convey an easement for such purpose is suggested. See also *Marshall v. Standard Oil Co.,* 17 Cal. App. (2) 19. Since the decisions themselves on this problem are not in harmony, it appears inadvisable to trust to chance. It is so much easier to have the deed speak plainly.

FICTITIOUS DEFENDANTS

C.C.P. 474 provides for suing by fictitious name when the true name of a defendant is unknown. It also provides that ". . . when his true name is discovered, the pleading, or proceeding must be amended accordingly . . . ." Frequently, after the complaint has been filed, it is ascertained that a named defendant is deceased or incompetent. An attempt to later bring in as a party defendant a representative (administrator, executor or guardian) who was not in being (in such representative capacity) at the time of filing the complaint will undoubtedly give rise to difficulties. C.C.P. 474 does

not appear to contemplate this type of situation, since it is designed to cover the later substitution of a "true name." Where the representative is appointed *after* the complaint has been filed, it appears to be necessary to file an amended complaint. In this regard see *Flinn v. Gouley,* 139 Cal. 623, and *White v. Johnson,* 40 Pac. 511 (Oregon).

FICTITIOUS NAME

Section 2466 *et seq.,* Civil Code, set forth the requirements relative to transacting business under a fictitious name. Frequently, in connection with such mode of doing business, real property may be acquired. The mere adoption of such a name does not, however, create an entity which is capable of acquiring title to real property. Whereas a partnership or a corporation is an entity capable of holding title to real property, a mere fictitious name is not. Where, for example, John Doe is doing business under the fictitious name of "ABC Products," a deed of real property to "ABC Products" is in fact a deed without a grantee and the result thereof appears to be that whereas the equitable title is in John Doe, the legal title remains in the grantor, as a resulting trustee for the benefit of John Doe. In the event of the death, incapacity or disappearance of the grantor, John Doe will experience difficulty in enforcing such resulting trust. Title should be taken in "John Doe, doing business under the fictitious name of ABC Products."

FORECLOSURE BY TRUSTEE'S SALE

Whereas a foreclosure of a trust deed by a trustee's sale ordinarily passes absolute title and wipes out junior liens, such a foreclosure does not eliminate Federal tax liens, even though such tax liens are junior on the record to the trust deed being foreclosed. (*Metropolitan Life Insurance Co. v. United States,* 107 Fed. (2) 311, certiorari denied in 84 L.Ed. 1400.) Before proceeding to sale, therefore, it behooves the beneficiary to run the title to date, in order to ascertain whether or not such tax liens exist. If so, it appears advisable to consider foreclosing by judicial action and to name the federal government as a party defendant, as allowed by 28 U.S.C.A. 2410.

Where mechanic's liens appear of record, it should be borne in mind that, although filed after the deed of trust, they relate back, for purposes of priority, to the date of commencement of work (C.C.P. 1188.1) and hence may in fact be prior to the deed of trust.

In such case, it is obvious that the liens would not be eliminated by a trustee's sale. This situation dictates the use of judicial foreclosure proceedings, and the pleadings must affirmatively raise the question of priority. (*Barrow v. Santa Monica Builders Supply Co.*, 9 Cal. (2) 601.)

HOMESTEAD PROBLEMS

(1) *Attachment:* The fact that an attachment has been filed on real property of a debtor does not mean that the creditor's position is secure as against a later declared homestead. Whereas an attachment ordinarily serves to hold priority as against items appearing later, it does not defeat the right to later declare a homestead and thereby destroy the efficacy of the attachment. (*Wilson v. Madison*, 58 Cal. 1.)

(2) *Divorce:* (a) Where the divorce complaint alleges and the interlocutory decree finds the real property to be community and awards it to either spouse, it should be borne in mind that the parties are still married and that a declaration of homestead made by either, before final decree, gives a homestead interest to the other spouse and thereby brings into being the elements of Restraint (C.C. 1242) and Devolution upon death (Probate Code 663.)

(b) When real property which is subject to a homestead is the community property of the spouses and no disposition thereof is made in the divorce action, title vests in the parties, as tenants in common and their respective interests are subject to determination in a future action such as partition. (*Lang v. Lang*, 182 Cal. 765.)

(3) *Evidence:* In preparing a declaration of homestead for a client, consideration should be given to the effect of C.C. 1263, sub. 5, which provides that a declaration of homestead which contains the verified statement as set forth in said subsection shall be *prima facie evidence* of the facts therein stated, and *conclusive evidence* thereof in favor of a purchaser or encumbrancer in good faith and for a valuable consideration (emphasis mine). Surprisingly few of the homestead declarations encountered by the writer contain such a verified statement, although the benefits accruing therefrom are obviously helpful to the declarant.

(4) *Execution proceedings:* Whenever the attorney for a judgment creditor has inadvertently neglected to perfect a judgment

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Los Angeles County Law Library Recent Acquisitions

EDITOR'S NOTE: *The Los Angeles Bar Bulletin is adding the following regular feature, starting with the current issue. Through the courtesy of Mr. Forrest S. Drummond, Librarian, and his excellent staff, the following selected list of recent acquisitions of the Los Angeles County Law Library will be provided as a research and reference aid to attorneys.*

Alhadeff, D. A. Monopoly and competition in banking. 1954, 254 p.

Blaustein, A. P. Fiction goes to court. 1954, 303 p.

Cohen, A. H. Long term leases; problems of taxation, finance and accounting. 1954, 151 p.

Coudert, F. R. Half a century of international problems; a lawyer's views. 1954, 352 p.

Emerson, F. Shareholder democracy. 1954, 242 p.

Federal Tax Forum. How to work with the Internal Revenue Code of 1954. 1954, 577 p.

Friedman, M. R. Contracts and conveyances of real property. 1954, 425 P.

Gonzales, T. A. Legal medicine, pathology and toxology, 2d ed. 1954, 1349 p.

Gower, T. H. Outer continental shelf lands: Mineral leasing laws and regulations. 1954, loose-leaf.

Hoebel, E. A. The Law of primitive man. 1954, 757 p.

Jacob, P. E. The Future of the United Nations: Issues of Charter revision. 1954, 237 p.

Kimbrough, R. T. American law of veterans, 2d ed. 1954, 1389 p.

Kvaraceus, W. C. The Community and the delinquent. 1954, 566 p.

Lasser, J. K. Handbook of accounting methods, 2d ed. 1954, 1149 p.

Legal Secretary's Handbook (California) 1954, 518 p.

Levy, S. Accountants' legal responsibility. 1954, 288 p.

McBride, E. D. Disability evaluation: Principles of treatment of compensable injuries, 5th ed., 1953, 715 p.

MacCahan, D. Accident and sickness insurance. 1954, 334 p.

McCormick, C. T. Evidence (Hornbrook). 1954, 774 p.

MacDonald, B. J. S. The Trial of Kurt Meyer (War Crimes). 1954, 214 p.

Mulder, J. E. The Drafting of partnership agreements (Jan. 1954). 1954, 131 p.

Musmanno, M. A. Across the street from the courthouse. 1954, 411 p.

Nussbaum, A. A. Consise history of the Law of Nations, 2d ed. 1954, 376 p.

Prentice-Hall. Handbook of business forms. 1953, 393 p.

San Francisco. Municipal Code. 1954, in parts.

Schweitzer, S. C. Cyclopaedia of trial practice. 1954. 4 v.

Spellman, H. H. How to prove a prima facie case, 3d ed. 1954, 701 p.

Stern, R. L. Supreme Court practice, 2d ed. 1954, 585 p.

U. S. Air Force. Judge Advocate General. Court-martial instructions drafting guide. 1954, loose-leaf.

U. S. Bureau of the Census. Statistical abstract of the United States. 1954, 1056 p.

Ver Ploeg, B. Farm income tax manual. 1954, loose-leaf.

Witkin, B. California procedure. 1954, 3 v.

World Peace Foundation. European peace treaties after World War II. 1954, 341 p.

Zoning Bulletin, v. 1, no. 1-date. 1954.

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of February, 1930, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

The new officers of the Los Angeles Bar Association are **Norman A. Bailie,** President; **Irving M. Walker,** Vice-President; **Robert P. Jennings,** Junior Vice-President; **T. W. Robinson,** Treasurer; **Lloyd Wright,** Secretary; and Trustees **Arthur M. Ellis, Joe Crider, Jr., Henry F. Prince, Lawrence L. Larrabee, Bertin A. Weyl** and **Clement L. Shinn.**

* * *

William Howard Taft, Chief Justice of the United States and the 27th President of the United States, has resigned from the highest Court due to ill health. President **Hoover** nominated **Charles Evans Hughes** as his successor. After a 4-day debate in the Senate, during which he was assailed as reactionary, Hughes was confirmed 52 to 26. In assuming the new post, Chief Justice Hughes will be taking over the work laid down by the man who first appointed him as an Associate Justice of the Court twenty years ago.

* * *

Judge **Thomas L. Ambrose** has been elected Presiding Judge of the Municipal Court. He was appointed to the Court when it was first formed in 1926.

* * *

New officers of the Junior Bar Association of Los Angeles are **John D. Richer,** Chairman; **Grant Cooper,** First Vice-Chairman; **John Oliver,** Second Vice-Chairman; and **Orlo Poe,** Secretary.

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

"The practice of law certainly has changed during the past half century but it is interesting to note that one thing about the law has not changed, and that is the loyalty of a lawyer to his client. It is a shame that the average citizen is not more fully familiar with this trait possessed by every lawyer worthy of the name. Unfortunately, the press, on the theory that it is no news when dog bites man, publishes the stories of man biting dog until many citizens get the idea that the honest attorney is a rarity."—Erle Stanley Gardner in the **Cleveland** Bar Association Journal.

* * *

Justice (and formerly twice Chief Justice) George E. Bushnell has resigned from the Supreme Court of **Michigan** to take up his new duties as Sovereign Grand Commander of the Supreme Council of the Thirty-third Degree, Scottish Rite, for the Northern Masonic Jurisdiction of the United States.

* * *

Every now and then this department gets a letter. A recent one from Milton E. Bachmann, the alert Executive Secretary of the State Bar of **Michigan,** follows:

Sir:

"*The Brief Case,* monthly publication of the Bar Association of San Francisco, has taken on a new and very engaging look. In fact it is now one of the most attractive association publications that we are privileged to receive." [Los Angeles Bar Bulletin, December, 1954, p. 93.]

Are the angels going chicken?

Out here in Michigan where we're east to you and west to N. Y., we always thought that there was an honest-to-gosh feud between L. A. and Frisco, and that respectable citizens of either camp wouldn't visit the other without proper disguises and artillery.

Now I am dismayed, perplexed, slightly mixed up. Perhaps this feudin' bizness was just a fake to scare lawyers from emigrating to California. Apparently, the folks of Los Angeles love the folks of Frisco. Must be so because your high flattery emerges as number 1 item under (of all names) "Brothers-in-Law."

Frankly, we're going to miss that imaginary valley of death that separates the two cities. It was fun while it lasted. . . .

"In the twenty-two years that I have been a referee I have operated on the principle that next to war, litigation is the largest single item of preventable waste."—Irwin Kurtz, referee in bankruptcy in the **Southern District of New York.**

* * *

Despite "adverse weather conditions," nearly 1,200 lawyers attended the Fifteenth Annual Tax School recently held in Des Moines under the auspices of the **Iowa** State Bar Association.

* * *

The **Dallas** Bar Association is studying proposed new rules to control "curb service" justice in Dallas County district courts. The proposed rules, described by the *Texas Bar Journal* as "highly controversial," deal with "the multitude of non-scheduled and uncontested cases sandwiched by judges in between contested cases."

* * *

The **Houston** Bar Association and a group of ministers formed the Attorney-Minister Council of Harris County, Texas, to furnish religious guidance to first offenders who are charged with a felony offense. The free counseling will be furnished only when requested and only if the person seeking it has no personal minister.

* * *

"While it is cheap wit for many to say sneering things of our profession, yet, if you strike from Anglo-Saxon history the thoughts and deeds of her lawyers you rob it of more than half of its glory. Blot from American society today the lawyer with all the work that he does and all the power he exerts, and you leave society as dry and shifting as the sands that sweep over Sahara. For the mystic force that binds our civilization together and makes possible its successes and glories in the law, and they who minister at its shrine and keep alive its sacred fires, are you and I and that vast multitude of our co-workers who boast no higher title than of lawyer."—Justice David J. Brewer.

* * *

"About a week ago, Judge Monroe told a woman witness to speak as if she were at home. The case is still pending."—From *BARbs,* a highly imaginative department of *Dicta,* publication of the **San Diego** Bar Association.

OPINION NO. 220
(May 14, 1954)

COMMUNICATIONS OR NEGOTIATIONS WITH OPPOSING PARTY—CONFLICTING INTERESTS. Duty of Attorney Retained by Insurance Company to Apprise Defendant of Settlement Offer. Right of Plaintiff's Attorney to Advise Insured of Offer.

A lawyer has directed the following inquiry to the Committee:

"I represent the plaintiff in a pending negligence action. The defendant is insured under a liability policy with low limits. I believe that the liability of the defendant is clear and that it may be possible for me to recover a verdict substantially larger than the policy limit.

"The defendant is represented by only one attorney, retained by the insurance company. I believe that there is a conflict of interest between his two clients, inasmuch as it is to his individual client's benefit to settle for the policy limit, and it is to the company's interest to take a chance on the outcome of a trial.

"I propose to write a letter to defendant's attorney, offering to settle the claim in suit for the policy limits.

"Under the foregoing circumstances, is it proper for me to mail a copy of my letter direct to the defendant?"

Rule 12 of the Rules of Professional Conduct of the State Bar provides in part as follows:

"A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel . . ."

Canon 9, A.B.A. Canons of Professional Ethics, provides in part as follows:

"A lawyer shall not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel . . ."[1]

However, if it clearly appears that the attorney for the insurance company has not advised and will not advise the insured of his rights and risks under the facts stated, it may be the right and duty of the counsel for the injured party so to advise the insured after warning said attorney.[2]

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[1]See *Carpenter v. The State Bar*, 210 Cal. 520 (1930), and also Resolution XLIII of Hoffman's "Fifty Resolutions in Regard to Professional Deportment" (1836), set out in Drinker's "Legal Ethics" (1953) at page 349.

[2]Drinker (supra) at page 203 says:

"Where an insured is represented by counsel for an insurance company who, because of his desire to protect the company, will not advise the insured of all his rights and risks, it may be the right and duty of counsel for the injured party so to advise the insured, after warning such counsel."

26 Cal. State Bar Journal (1951) at page 362, states:

"Good faith on the part of the insurance carrier requires a full disclosure to the insured of the excess problem and the progress of settlement negotiations . . ."

Accordingly, under the facts stated, it is the opinion of the Committee that counsel for the injured person may request or even insist that the offer be communicated to the defendant by the attorney retained by the insurance carrier, and if the attorney refuses to do so, then counsel may send a copy of his offering letter to the insured.[3]

This opinion is limited to the question propounded.[4]

This opinion, like all opinions of this Committee, is advisory only. (By-Laws, Art. X, Section 3.)

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[3]See Footnote 2. Also note the language of the writer in 26 Cal. State Bar Journal (supra) as follows:

". . . a conflict of interests between the assured and the insurance company arises immediately upon the filing of a complaint containing a prayer for damages in excess of the policy limits. The attorney retained by the insurance company is also the attorney for the assured and owes to both 'the high duties imposed by statute (Bus. & Prof. Code, Sec. 6068) and by the rules governing professional conduct.'" (Citing Pennix v. Winton, 61 C.A.2d 761, 773 (1943).) "It seems clear that counsel must immediately advise both the assured and the insurance company of the conflict presented. If the assured then elects not to secure the services of his own attorney, counsel must so advise his corporate client and secure its permission to keep the assured fully advised as to the progress of settlement negotiations and other matters which could possibly affect his personal liability."

[4]The Committee wishes to limit itself as indicated, especially because there may be some legal, ethical or practical question arising from additional facts, relationship of the parties, requests for reasonable contribution, attempted extension of the obligation of the insurer "beyond the duty of exercising good faith in the conduct of the matters arising from that relationship." (Research unfolds no Appellate Court decision in this State. There is a United States District Court opinion in the Northern District of California entitled *Christian v. Preferred Acc. Inc. Co., et al.*, 89 F. Supp. 888 at 890, wherein that Court cites an unreported opinion by the Superior Court in San Francisco sitting as a nisi prius court.)

Appreciation of the Los Angeles Bar Association is extended to the members of the Federal Courts Criminal Indigent Defense Committee who are contributing their services and time on behalf of the Association and the Bar in general. Those who volunteered to serve during the month of January, 1955, are as follows:

KENNETH CLEAVER	WILLIAM M. SARNOFF
VINCENT N. ERICKSON	PRUDENCE N. THRIFT
RAFAEL H. GALCERAN, JR.	ROY B. WOOLSEY
BENTLEY M. HARRIS	JOSEPH L. WYATT, JR.

JACK E. HILDRETH, *Chairman for January, 1955*

WHAT KIND OF INDEPENDENCE DO WE ASK IN THE JUDICIARY?

(Continued from page 133)

> sonal prejudice. There was nothing in these judicial utterances indicating that the judge entertained or expressed any opinion that this appellant was guilty." (Ryan v. United States, 1938, 8 Cir., 99 F. 2d 864, 871.)

Unlike the statute of California which requires a charge of disqualification to be determined by another Judge (California Code of Civil Procedure, Sec. 170), the federal law of disqualification provides for automatic disqualification. The Judge is required to disqualify himself if the affidavit is factually sufficient. (28 U.S.C., Sec. 144.) But the Courts have held that the affidavit must charge bias or prejudice that is *personal* and that a mere attitude towards legal problems or adverse rulings are insufficient. (Ex parte American Steel Barrel Co., 1913, 230 U.S. 35, 43-44; Wilkes v. United States, 1935, 9 Cir., 80 F.2d 285, 289; Price v. Johnson, 1942, 9 Cir., 125 F.2d 806, 811; Beecher v. Federal Land Bank of Spokane, 1945, 9 Cir., 153 F.2d, 987, 988; Littletown v. DeLashmutt, 1951, 4 Cir., 188 F.2d 973, 975; and see the writer's opinion in Cole v. Loew's, Inc., D.C. Cal., 1948, 76 F. Supp. 872, affirmed, *in this respect,* in Loew's Inc. v. Cole, 9 Cir., 1950, 185 F.2d 641, 646.)

And so, when years ago, I declined to step out of a case at the behest of a motion picture company because they claimed I had, before the case was before the federal courts, expressed a view as to the law involved in the litigation,—*a position which the Court of Appeals upheld,*—I was acting in the same spirit as many other federal judges past and present. It would have been easier to deny disqualification and transfer the case to another Judge. But the easiest way is not always honorable. So I wrote:

> ". . . Judge Otis has echoed the sentiment which I have expressed repeatedly, that a law suit is 'a means to achieve justice through law—not a game in which the prize is to go to the more skillful.' * * * Like him, I must reject an attempt to disqualify which has no legal foundation to support it and which, if successful, is, for the reasons already indicated, fraught with serious dangers for the efficiency and inde-

> pendence of the Federal Judiciary. So doing, I incur the risk of having the defendant feel that, consciously or unconsciously, my action might result in resentment against them or their opponent think that—as lawyers say—I might 'lean backwards.' But I must hazard such speculation. And so I have taken my stand. With God as my witness, I cannot, in good conscience, take another." (Cole v. Loew's, Inc., 1948, D.C. Cal., 76 F. Supp. 872, 881.)

In so acting, we deny to litigants the right to "pick" judges, as we deny them also the right to designate what cases we are or are not to try. If bias or prejudice exists against the litigant, it is unitary. It cannot be split up by counsel claiming that in a paricular case, they will not question the judge's qualifications to act, but they will do so in others.

This attitude applies to litigants in civil cases and to litigants in criminal cases. In the Missouri case it was the defendants who sought to disqualify the Judge. But in the recent Lattimore case, it was the Government of the United States which attempted to do the same thing. The facts are well known and can be treated with brevity to point the moral of this talk.

Owen Lattimore was indicted for perjury. On a previous indictment, Judge Luther W. Youngdahl had thrown out some of the perjury counts. On appeal, the Court of Appeals for the District of Columbia, sitting *en banc*, sustained the ruling of Judge Youngdahl in the most important assignments of perjury. (United States v. Lattimore, 1954, U.S. App. D.C., 215 F.2f 847.) There had been no trial of the cause. The action of the Judge related merely to motions to dismiss the indictment upon which he ruled. Nevertheless, the United States Attorney for the District of Columbia filed an affidavit of bias or prejudice against Judge Youngdahl in which it was claimed that the language he had used in granting the motions indicated a prejudice in favor of the defendant or a conviction that he was not guilty. Judge Youngdahl used these burning words to answer this charge:

> ". . . The factual allegations are simply that in taking judicial action in this case I used certain words. These words cannot reasonably be thought to 'give fair support' to an inference of bias and prejudice. Moreover, the Supreme Court determined long ago ' * * * that the bias or prejudice which can be urged against a judge must be based upon something other than rul-

> ings in the case.' Berger v. United States 255 U.S. 22, 31, 41 S. Ct. 230, 232, 65 L. Ed. 481. Obviously therefore it must be based upon something other than the words the judge used in setting forth his rulings.
>
> "At bottom the affidavit is based upon the virulent notion that a United States judge who honors and adheres to the sacred Constitutional presumption that a man is innocent until his guilt is established by due process of law has 'a bent of mind' that disables him from conducting the fair and impartial trial to which both the accused and the Government are entitled. The affidavit is therefore so patently and grossly insufficient that I cannot escape from the conclusion that the purpose of the affidavit is to discredit in the public mind the final action of our courts or else to intimidate the courts themselves. It follows that those who made or authorized the certificate that the affidavit was made in good faith acted irresponsibly and recklessly as lawyers and officers of the Government.
>
> "Under my oath to preserve sacred Constitutional principles, I can properly do no less than to strike the affidavit as scandalous." (United States v. Latimore, 1954, D.C. D. C., 125 F. Supp. 295, 296.)[1]

III

A DANGEROUS PROPOSAL

In this connection there is a proposal fraught with great danger to which I desire to call attention.

I begin with a story. When Bishop John Fell was at Oxford, Tom Brown came before him for punishment for an infraction of some of the rules. The noted clergyman told the young man that he would overlook the matter if he made an on-the-spot satisfactory translation of the following epigram of Martial:

Non amo te, Sabidi, nec possum dicere quare:

Noc tantum possum dicere non amo te.

---

[1]Even state courts will scrutinize the language of lawyers who criticize judges and will consider them as ground for discipline if they introduce into proceedings what the Supreme Court of California once called

> "something purposely and gratuitously offensive." (Works v. Superior Court, 1900, 130 C. 304, 307, 62 P. 507.)

And see, In re Collins, 1905, 147 C. 8, 19-20, 81 P. 220; Matter of Humphrey, 1917, 174 C. 290, 296, 163 P. 60; In re McCowan, 1917, 177 C. 93, 104, 170 P. 1100; Peters v. State Bar, 1933, 219 C. 218, 224, 26 P(2) 19. And the language will be condemned even though, as these cases indicate, the language may be used by an attorney during a state Judge's campaign for re-election.

Tom Brown translated:

I do not love thee, Doctor Fell,
The reason why I cannot tell:
But this alone I know full well,
I do not love thee, Doctor Fell.

In the same spirit, the Judiciary Committee of the United States Senate, at its last session, recommended for adoption a Bill,—S.3517 of the 83rd Congress—which would amend the section on disqualification so as to allow a litigant to disqualify a federal district judge by filing an affidavit stating

> ". . . that he verily believes the Judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party."

Contrary to the present statute which requires "the facts and reasons for the belief" to be stated and which calls for a judicial determination whether the affidavit is legally sufficient, the proposed amendment specifically provides that the affidavit "need not state the facts and the reasons for the belief," that bias or prejudice exists. When the affidavit is filed, it automatically disqualifies the Judge. The amendment provides that he shall have no further jurisdiction

> " . . . with respect thereto, but shall notify the senior (the chief) circuit judge of the circuit and another judge from a different district shall be assigned to hear such proceeding."

This means that in a multiple court like ours consisting of eleven judges, such an affidavit could disqualify every judge in the district. In states which have only one district, Judges would have to be imported from other states and, in the District of Columbia, from another Circuit. The judicial function would stop in its tracks, as the Chief Judge of the Circuit is asked to assign a judge to hear the matter.

The Committee on Revision of the Laws of the Judicial Conference of the United States, in a Report dated November 8, 1954, and signed by its three members, Albert B. Maris, Circuit Judge, Third Circuit, Chairman, Clarence G. Galston, District Judge, Eastern District of New York, and William F. Smith, District Judge, New Jersey, has condemned the Bill in these words:

> "The effect of the proposed bill is thus to give to every party in a proceeding in a district court the right to one peremptory

> challenge of the district judge who is to try this case and thereby to secure the assignment of a judge from another district to try it. The Committee on Revision of the Laws believes that it would be unwise and not in the public interest to accord parties to a litigation such a right which they could exercise arbitrarily and without specifying any basis for their allegations of bias and prejudice. To permit it would open the way to gross abuse and might well disorganize the operations of a busy district court as well as drain off the personnel of adjoining district courts who would have to be assigned to hear cases in which affidavits of bias and prejudice had been filed."

The Judges of this Court unanimously instructed me at their meeting of December 13, 1954, to express their opposition to this Bill. In a letter addressed to Judge Maris, under date of December 14, 1954, I wrote:

> "It is our view that a bill that would allow disqualification at the whim of a litigant, including the Government, which, in our District, is one of most important litigants in civil matters, is very dangerous. Particularly objectionable is the provision that requires that a judge from a different district be assigned by the Chief Circuit Judge to hear the matter. This, in effect, would mean that in this district, which has eleven judges, the filing of an affidavit of disqualification would disqualify not only the Judge before whom the matter is heard, but *every member of the court.*"

It is regrettable that a Committee of the Senate of the United States, consisting af lawyers, should have given its approval to a piece of legislation which would enable a litigant, including the United States Government, to disqualify by an affidavit *not based on facts* all the judges of a district. To paraphrase the words of Mr. Justice Jackson, the supreme object of the lawyer's calling

> ". . . is to protect the process of orderly trial." (Sacher v. United States, 1952, 343 U.S. 1, 14.)

A law which would allow disqualification upon such basis is, perhaps, indicative of the tragic era in which we live, in which values seem to be forgotten and we seem to be all intent on doing the unusual, without regard as to whether a gain in a particular case is worth the sacrifice of that orderly process which is of the essence of the administration of justice in a democratic society.

This is not to deny that Judges, being human, are above bias or prejudice. But the present law which requires that the facts

which constitute such bias or prejudice should be stated protects adequately any litigant. A litigant, be he the Government or a private person, is entitled to equal justice. Ours is the great promise of Magna Carta:

> "To none will we sell, to none will we deny or delay right or justice."

A principle which would enable a litigant to gain an advantage by the mere filing of an affidavit stating *beliefs not supported by facts,* would destroy one of our most precious of our heritages,—justice through law.

So once more I call upon you, as younger members of the Bar, to "stand at Armageddon" and battle for the protection of the integrity of the courts by helping defeat all attempts to undermine the judicial process by cowing judges. Only if you help judges stand unafraid will they be able to live up to the Biblical injunction,

> "Ye shall not be afraid of the face of man." (Deuteronomy I: 17.)

FREQUENTLY RECURRING TITLE PROBLEMS

(Continued from page 138)

lien for his client (as provided for in C.C.P. 674), there is ever-present the possibility that the debtor may cause trouble for the creditor, by declaring a homestead. Execution proceedings against the homestead *must* be carried out in the special manner provided for in C.C. 1245 *et seq.* A conventional levy of execution is ineffective as against a homestead declared before the judgment becomes a lien and the creditor so levying not only loses his execution lien but he may never come back on the homestead property, under the same judgment. (*Arighi v. Rule, etc.*, 41 C.A. (2) 852.) When no abstract of judgment has been filed, the title to the property should be searched up to the moment of sale, since a declaration of homestead may be filed after the levy of execution and up until the actual sale. (*Yager v. Yager*, 7 Cal. (2) 213.)

(5) *Separate property:* When real property is in fact the separate property of either spouse and is so vested of record, a declaration of homestead by the owner thereof, being for the joint benefit of both spouses, automatically creates a homestead interest in the other spouse and brings into being both the restraint upon alienation (C.C. 1242) and the devolution upon death as provided for in Probate Code 663 (often referred to as an "involuntary joint tenancy"). Under such circumstances, a declaration of homestead is often ill-advised.

(6) *Wills:* Frequently an attorney prepares a Will for a married client and subsequently the client declares a homestead (either with or without benefit of legal advice). If the attorney later probates the Will of his now-deceased client (either with no knowledge of the homestead or failing to realize its significance) and the property is distributed to someone other than the surviving spouse, an embarrassing situation develops when it is later ascertained that the property vested in the survivor, pursuant to Probate Code 663, and the probate proceedings were ineffective, as regards the homestead property.

Obviously, the same effect prevails whether the Will was published before or after the homestead was declared. For that reason, it appears to be advisable to inquire as to the existence of a homestead, when preparing a Will, and to impress upon the client the seriousness of declaring a homestead.

JOINT TENANCY

(1) *Conversion by single instrument:* At common law, a conveyance from a person to himself was void. Hence, any attempt to convert tenure from one type to another had to be done through the medium of a "straw-man" or "dummy." By virtue of an enabling statute (C.C. 683) persons holding title other than as joint tenants may create a joint tenancy by a single deed, under the terms of said section. It forms a trap for the unwary, however, in that the conveyance must go "to themselves, or to themselves and others . . . ." Hence A and B may convey to A and B as joint tenants, or to A, B and C as joint tenants, but they may not, under the language of C.C. 683, convey to A and C as joint tenants. In other words, they may add additional parties, as grantees, but may not subtract any grantor.

(2) *Between a spouse and a stranger:* Because of the community property principles and presumptions (as outlined in C.C. 164) we find that a joint tenancy between a married man and a stranger is questionable, since the interest of the married man (if acquired as contemplated by C.C. 164) is presumptively the community property of himself and his wife. In order that such a joint tenancy be free from doubt, it is suggested that the wife either join as a grantor or execute a separate conveyance to the grantees, thereby signifying her consent.

A joint tenancy between a married woman and someone other than her husband is also questionable, since C.C. 164 provides that property acquired by a married woman is *presumptively* her separate property. Obviously, a non-consenting husband might later rebut the presumption.

(3) *Between two sets of spouses:* When real property is being acquired by two sets of spouses (*e. g.*, father and mother and child and spouse) and the purchase price is being paid one-half by each couple, great care should be exercised to ascertain the true intent of the parties. Frequently, the conveyance to them reads "A, B, C and D as joint tenants," whereas their true intention later (after the death of a party, invariably) is said to have been that the conveyance read "A and B, husband and wife, as joint tenants, as to an undivided one-half interest, and C and D, husband and wife, as joint tenants as to the remainder." The difference is quite obvious.

JUDGMENTS

C.C.P. 674 provides for obtaining a lien on real property by recording an abstract of judgment. Where several such abstracts have been filed during the time when the debtor owned Blackacre, the various creditors are accorded priority in the order of the recordation of the abstracts. Suppose, however, that the judgment debtor later acquires Whiteacre. All such judgment liens attach at the moment of acquisition and hence are, as to such later-acquired property, liens of equal rank. The rule in such case is that he who first levies execution on such property thereby obtains a superior lien. (*Hertweck v. Fearon,* 180 Cal. 71.)

As to property which is registered (under the Torrens system) it is probable that no lien is created unless the abstract of judgment is registered, as required by Section 91 of Land Registration Act (no California cases in point, but so held, as to a mechanic's lien, in *Hammond Lumber Co. v. Moore,* 104 C.A. 528). Since C.C.P. 674 requires that it be "recorded" and the Land Title Act requires that it be "registered," it appears that both procedures are necessary.

It should also be borne in mind that the five-year lien period provided for in C.C.P. 674 was not affected by the 1953 amendment to C.C.P. 337.5 which extends the life of a judgment to ten years.

LEASES

The mere fact that a document is entitled "Assignment" rather than "Sub-lease" is, of course, not of itself determinative of the true nature of the document. Where, for example, A executes an oil lease in favor of B; B makes an "asignment" to C and reserves an over-riding royalty; B then transfers his reserved over-ride to D and C then reassigns the lease to B. What are the rights of the parties? If the "assignment" from B to C is in fact a sub-lease, the re-assignment to B may operate to terminate the sub-lease and extinguish the royalty interest of D. The state of the law in California on such point is not very clear. Where a right of reverter is reserved, it is definitely a sub-lease. (*Hartman Ranch Co. v. Associated Oil Co.,* 10 Cal. (2) 232.)

MECHANICS' LIENS

(1) *Lis Pendens:* Prior to 1953, no *lis pendens* was required in connection with a mechanics' lien foreclosure suit. In that year, C.C.P. 1198.1 was amended to provide that no mechanics' lien shall bind any real property for a period longer than ninety

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days, unless a suit to foreclose be commenced within such time and a notice of pendency of such proceedings be filed as provided in Section 409. As to whether or not failure to file a *lis pendens* constitutes a jurisdictional defect has not yet been decided. In the opinion of the writer, failure to so file under this section should be deemed to constitute a jurisdictional defect, similar to failure to so file under C.C.P. 755, dealing with partition suits.

(2) *Partially completed structures:* A contemplated purchase of or loan upon a partially completed structure invariably gives rise to complications relative to pre-existing lien rights. The mechanics' lien relates back, for the purposes of priority, to the time of commencement of work (C.C.P. 1188.1). Hence, even though no liens have yet been filed, they will, when timely filed, relate back. The time for filing such liens, as spelled out in C.C.P. 1193.1, is as follows:

(a) *When a valid notice of completion has been filed:*
(1) 60 days thereafter, as to the original contractor.
(2) 30 days thereafter, as to all other claimants.

(b) *If no valid notice of completion has been filed:*
90 days, as to all claimants.

When the structure is only partially completed, it is obvious that no valid notice of completion may be filed. In order to start the lien period running, the owner may file a Notice of Cessation of Labor (as provided for in C.C.P. 1193.1), sub. (h), in which event the time element works as follows:

(a) *Where cessation, but no notice filed:* If there has been an actual cessation of labor for a continuous period of sixty days, but no notice thereof has been filed, all claimants may file within ninety days from the expiration of such sixty-day period (a total of 150 days) (C.C.P. 1193.1, sub. (g)).

(b) *Where cessation and notice filed:* If there has been an actual cessation of labor for a continuous period of thirty days or more and a notice thereof has been filed, (as provided for in C.C.P. 1193.1 (h) the time for filing liens is as follows:

(1) Within 60 days from the filing of the notice, as to the original contractor.
(2) Within 30 days therefrom, as to all other claimants.

Obviously, consideration should be given to the benefits to be derived from filing such a notice and thereby materially reducing the time within which valid liens may be filed.

(3) *Priority problems in foreclosing deeds of trust.* Since a mechanics' lien relates back, for purposes of priority, to the time of commencement of the work (C.C.P. 1188.1) a deed of trust, although recorded prior to the recordation of a mechanics' lien, may in fact be junior to the mechanics' lien, if the deed of trust was recorded after the commencement of work. It will be seen, therefore, that a foreclosure by Trustee's Sale may not eliminate a mechanics' lien which appears on the record to be junior to the deed of trust. Since this type of situation resolves itself into a question of fact and since it is highly probable that a title company must decline to insure free of the mechanics' lien after a Trustee's Sale foreclosure, it is suggested that consideration should be given to a judicial foreclosure of the deed of trust. Such a suit may be used as a vehicle to determine the question of priority, but it is essential that the question of priority be properly put in issue by the pleadings. (*Barrow v. Santa Monica Builders Supply Co.*, 9 Cal. (2) 601.)

NAMES

Whenever a person has acquired title to or a lien upon real property in one name and subsequently conveys or releases the lien under another name (*e. g.*, a woman acquires under her maiden name and later deals with the property under her married name, or vice versa), the gap in the record title may be bridged by the summary procedure for adjudication of identity as provided for in C.C.P. 751a.

Whenever an owner seeks to deal with real property after a change of name, the instrument of title should reflect the change of name, in the manner outlined in C.C. 1096. This latter section frequently comes into play in connection with corporations and partnerships which change their names from time to time.

(To be continued)

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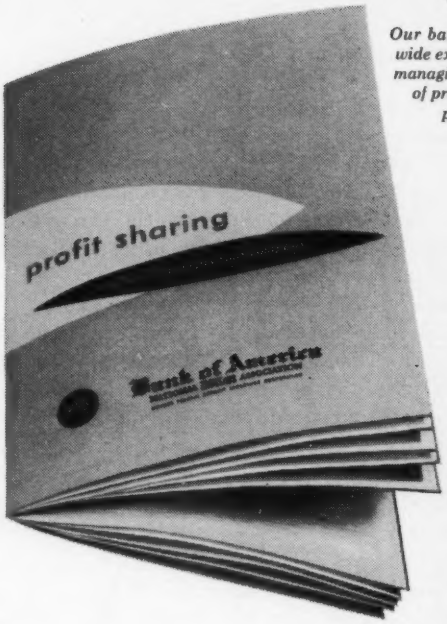

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